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**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

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COURT OF CRIMINAL APPEALS
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THE STATE OF TEXAS **APPELLANT**

V.

ERLINDA LUJAN **APPELLEE**

THE STATE'S BRIEF ON PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBERS 08-17-00035-CR, 08-17-00036-CR**

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TRIAL COURT: 243rd District Court, Judge Luis Aguilar, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Ann Crawford McClure, Justice Yvonne T. Rodriguez, and Justice Gina M. Palafox

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STATEMENT OF THE CASE

Erlinda Lujan, appellee, was indicted in trial-court cause number 20160D05527 for two counts of engaging in organized criminal activity, arising out of the aggravated kidnappings of Isaac Lujan (hereinafter "Isaac") and James Tyler Hall (hereinafter "Hall"). (244CR:7-8).[1] Lujan was also indicted in trial-court cause number 20160D04874 for one count of engaging in organized criminal activity, arising out of the murder of Anthony Trejo (hereinafter "Trejo") (Count I), one count of tampering with a human corpse (Count II), and one count of tampering with evidence (Count III). (245CR:8-10).[2] After hearing Lujan's motions to suppress her statements, (244CR:18-20); (245CR:57-59); *see generally* (RR2:4-65), the trial court signed written orders on January 27, 2017, granting in part and denying in part Lujan's suppression motions and issued findings of fact and conclusions of law. (244CR:35, 47-52); (245CR:64, 87-92). The State timely

[1] Because the clerk's records in cause numbers PD-0244-19 and PD-0245-19 are not identical, references to those clerk's records will be made as "244CR" for cause number PD-0244-19 and "245CR" for cause number PD-0245-19. References to the four-volume reporter's records, which are identical in both cause numbers, will be made as "RR" and volume and page number, and references to the State's exhibits, which include transcriptions of the video- and audio-recorded statements at issue in these State's appeals and petitions for discretionary review (PDR), will be made as "SX" and exhibit number and page number, if applicable.

[2] The Eighth Court's opinion incorrectly states that Lujan was indicted with the foregoing three counts in a companion case. *See State v. Lujan*, No. 08-17-00036-CR, 2018 WL 4659578 at *1 (Tex.App.–El Paso, Sept. 28, 2018, pet. granted) (not designated for publication).

appealed the trial court's pretrial orders partially granting Lujan's suppression motions. (244CR:53-54); (245CR:87-98).

On September 28, 2018, in unpublished opinions, the Eighth Court affirmed the trial court's suppression rulings in part and reversed them in part. *See State v. Lujan*, No. 08-17-00035-CR, 2018 WL 4660185 at *1, 13 (Tex.App.–El Paso, Sept. 28, 2018, pet. granted) (not designated for publication); *State v. Lujan*, No. 08-17-00036-CR, 2018 WL 4659578 at *1, 13 (Tex.App.–El Paso, Sept. 28, 2018, pet. granted) (not designated for publication).[3] Specifically, the Eighth Court upheld the trial court's suppression of the second of three recordings in which Lujan spoke to police, holding that the second recording was not a continuation of the first for purposes of *Miranda* and article 38.22. *See Lujan*, 2018 WL 4660185 at *7-9; *Lujan*, 2018 WL 4659578 at *7-9. The Eighth Court then reversed the trial court's suppression of the third recording because the basis relied upon by the trial court to suppress that recording–that the detectives deliberately employed an impermissible two-step interrogation technique–was never fairly raised in the trial court, such that it was not a theory of law to support the trial court's ruling. *See Lujan*, 2018 WL 4660185 at *9-12; *Lujan*, 2018 WL 4659578 at *9-12. The

[3] The Eighth Court delivered separate opinions for each trial-court cause number, but both opinions are essentially identical. Thus, the State will hereinafter cite to both cases, but refer to the Eighth Court's opinions, as well as the trial court's rulings, in the singular.

Eighth Court then dismissed as moot the State's alternative arguments in its third issue that, with respect to the third recording: (1) the trial court abused its discretion to the extent it determined that Lujan had not been sufficiently warned prior to the third recording where all three recorded sessions were part of a single interview, such that the warnings given before the first session were still effective for the third, and she was again warned at the outset of the third recording; and (2) notwithstanding any alleged prior failure to comply with *Miranda* and article 38.22, Lujan's third-session statement was admissible because it was a properly warned statement that was voluntarily made. *See Lujan*, 2018 WL 4660185 at *12; *Lujan*, 2018 WL 4659578 at *12. After receiving one extension of time, the State timely filed its motions for rehearing on October 26, 2018, which were denied, without written opinion, by the Eighth Court on February 13, 2019.

On March 11, 2019, the State timely filed its PDRs, which this Court granted on the following ground: "The Eighth Court erred in upholding the trial court's ruling that the second, in-car session of Lujan's interview was not a continuation of the first, interview-room session, because: (1) under the *Bible* factors, the second-session interview was a continuation of the first; and (2) requiring police to re-*Mirandize* a suspect if the police engage in ambiguous conduct that *could be* construed as terminating, or setting a temporal limitation on,

the interrogation (and attendant *Miranda* rights) undermines the ease and clarity of *Miranda's* application by requiring officers to continually second-guess whether they made any such potentially ambiguous statements." By order of this Court, oral argument will not be permitted.

GROUNDS FOR REVIEW

SOLE GROUND FOR REVIEW: The Eighth Court erred in upholding the trial court's ruling that the second, in-car session of Lujan's interview was not a continuation of the first, interview-room session, because: (1) under the *Bible* factors, the second-session interview was a continuation of the first; and (2) requiring police to re-*Mirandize* a suspect if the police engage in ambiguous conduct that *could be* construed as terminating, or setting a temporal limitation on, the interrogation (and attendant *Miranda* rights) undermines the ease and clarity of *Miranda's* application by requiring officers to continually second-guess whether they made any such potentially ambiguous statements.

STATEMENT OF FACTS

On September 27, 2016, police arrested Lujan in connection with the murder of Anthony Trejo, which allegedly occurred on September 12, 2016, the same date as the aggravated kidnappings of Isaac Lujan and James Tyler Hall, for which Lujan was charged with two counts of engaging in organized criminal activity in trial-court cause number 20160D05527, and transported her to the El Paso Police Department (EPPD) headquarters. (244CR:7-8); (245CR:8-10); (RR2:6-7, 28).

The video recording of the first session of Lujan's interview (hereinafter "first session") commenced at 4:27 p.m., (RR2:9, 28); (SX1A at 16:27:03); (SX1B:2), and EPPD Detective Joe Ochoa, after advising Lujan that she was under arrest and a suspect in Trejo's murder, administered *Miranda* warnings to Lujan at 4:29 p.m. (RR2:10, 16, 28, 50); (SX1A at 16:29:21); (SX1B:4-5). Lujan, after agreeing with Det. Ochoa that she understood her rights and knowingly, intelligently, and voluntarily waived them, proceeded to speak with the detectives, namely, Dets. Ochoa and David Camacho. (SX1A at 16:30:24); (SX1B:5).

In this first-session recording, Lujan denied involvement in Trejo's murder and told the detectives that she had been forced to accompany certain unidentified individuals when they disposed of Trejo's body. (SX1B:6-12). The detectives'

questions were repeatedly met with Lujan's pleas to allow her to take them to the location of Trejo's body. (SX1B:13-14–where Lujan stated, "...can't I just tell you where the body's at? Please;" "I just–I know where the body is. I don't care if I go to jail for it;" "...I just want to get this over with, please. I'll take you wherever you want."). Stepping out briefly with Det. Camacho, Det. Ochoa returned to tell Lujan that they would drive her to the location of Trejo's body at that time, and the first session of Lujan's interview stopped at 4:42 p.m. (RR2:9, 17); (SX1A at 16:41:50); (SX1B:14-15).

At the very end of this first-session interview, Det. Ochoa stated the following before leaving the interview room:

> Let's see what we can find out there, okay. And we'll go from there. Let's take you down there right now 'cause it's–it's starting to get a little dark outside. We'd rather go out and see if you can just point out, if that's what you want to do.
>
> We'll put them in the front here.
>
> And when we come back, we can continue, if you like, okay? (SX1A at 16:42:15); (SX1B:15).[4]

A mere 6 minutes later, at 4:48 p.m. (and only 19 minutes after Lujan was *Mirandized* and voluntarily waived those rights), the detectives, now in an unmarked EPPD sedan with Lujan, resumed their questioning of her while she

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[4] Although defense counsel questioned Det. Camacho about the intent behind stating, "...when we come back, we can continue, if you like," it was actually Det. Ochoa who made this statement. (RR2:10-11); (SX1A at 16:42:15); (SX1B:15).

directed them to the general proximity of Trejo's body in Northeast El Paso. (RR2:11, 14-15, 30-32). Det. Camacho testified that, just as they did not generally re-*Mirandize* suspects after quick restroom breaks, they did not re-*Mirandize* Lujan because he believed that their questioning, which resumed within 6 minutes of leaving the interview room, was merely a continuation of their prior questioning. (RR2:11, 16-17, 29, 32-33). Unbeknownst to Lujan, since the vehicle did not have recording equipment, the approximately 3-hour second session of her interview (hereafter "second session") was recorded in audio format on a city-issued iPad that Det. Camacho placed on the middle of the backseat between him and Lujan. (RR2:11-12, 15-17, 41). Both detectives testified that they moved the interview to the vehicle because Lujan begged for them to take her to Trejo's body. (RR2:10-11, 13, 29-32, 50).

In this second session of her interview, Lujan, in directing the detectives to the general area where Trejo's body had been disposed, answered questions regarding her knowledge of Trejo's murder and the disposal of his body and, while relating these details, also spoke about other things, such as Isaac's kidnapping, Lujan's past employment as an "escort," and her prior drug use and trafficking. (RR2:15, 18-19, 22, 34-35); *see generally* (SX2A); (SX2B:3-11). Det. Camacho agreed that he and Det. Ochoa did not "...have any information on the date that

[they] were talking to her that she was a suspect..." in the kidnapping of Isaac and Hall and that "...the information that she was even involved in that came from her that day." (RR2:35). Once Lujan was unable to provide any more details about the precise location of Trejo's body, the detectives drove her back to police headquarters, and the second session of her interview ended at 7:50 p.m. (RR2:36); (SX2B:175).

After returning to police headquarters, the detectives placed Lujan in a cell while they coordinated with state and federal agencies, including the military, regarding the logistics of searching the dump site for Trejo's body. (RR2:18, 36-38). The video recording of the third and final session of Lujan's interview (hereinafter "third session") then commenced at approximately 10:01 p.m. on the same day (September 27, 2016), (RR2:17-19, 37-39); (SX3A at 10:01:01), and Det. Camacho, explaining to Lujan that "[t]his is a continuation of our interview that we had taken before," re-*Mirandized* Lujan at 10:01 p.m. (RR2:19-20); (SX3A at 10:01:34); (SX3B:2-3). Lujan, again agreeing that she understood her rights and knowingly, intelligently, and voluntarily waived them, continued to speak with Dets. Ochoa and Camacho. (SX3A at 10:02:00); (SX3B:3). This third session of Lujan's interview ended at 11:54 p.m. (RR2:20); (SX3A at 11:54:54); (SX3B:113).

At the suppression hearing, Lujan[5] argued that the statements she made during the second-session recording should be suppressed because she had not been re-*Mirandized*, she had only intended to take the detectives to the location of Trejo's body and nothing more, and "...they did not have a conversation about whether the interrogation would continue on the way to the dumpsite." (RR2:53-55). Lujan also argued for strict compliance with article 38.22 and that because the *Miranda* warnings she initially received in the first-session recording are not on the second-session recording, the second-session recording violates article 38.22 and is subject to exclusion under article 38.23. (RR2:53-54). According to Lujan, the *Miranda* warnings she initially received were not effective during the second session of her interview because the detectives recorded her in a "shady" and "underhanded" manner. (RR2:53, 55-56).

The prosecutor argued that the detectives were not required to re-*Mirandize* Lujan for her second-session statement because the first two sessions of her interview, as well as the third, were part of one continuous interview, particularly where the second-session recording began only 6 minutes after they left the interview room and less than 20 minutes after Lujan was initially *Mirandized* and waived her rights, such that the initial *Miranda* warnings she received were still

[5] Lujan did not testify at the suppression hearing.

effective through her second-session statement. (RR2:27, 57-61). As the prosecutor explained, "[t]his is one interrogation that happens to be in multiple rooms...." (RR2:61).

The trial court, finding that Lujan had been *Mirandized* and waived her rights, denied Lujan's suppression motion as to her first-session statement. (244CR:35, 47); (245CR:64, 87). However, the trial court concluded that Lujan's second-session statement was excludable because it was not taken in compliance with article 38.22 and *Miranda*. (244CR:35, 51-52); (245CR:64, 91-92).

Specifically, discrediting the detectives' explanation that they moved Lujan's interview to their vehicle because she insisted on showing them the location of Trejo's body, the trial court instead found that the detectives moved the interview only "...at the direction of the Detectives and their supervisors." (244CR:48); (245CR:88).[6] The trial court then speculated, in its findings, that Det. Ochoa's offhand statement that "...when we come back, we can continue, if you like" was somehow calculated to make Lujan "...believe that although any statements made at the interview room at police headquarters would be used

[6] The trial court's finding that Det. Ochoa simply "...asked [Lujan] if she would take them [where the body was] and she agreed," implying that it was only at Det. Ochoa's behest that Lujan's interview location was moved, is not entirely accurate. (244CR:48); (245CR:88). The recording indisputably reflects that Det. Ochoa only clarified, after Lujan repeatedly asked to be allowed to tell them where the body was located, if she wanted for them to transport her to that location: "You want us to take you where the body is at?" (SX1B at 13-14).

against her, any statements made on the way to look for the body would not." (244CR:48); (245CR:88).

Moreover, discrediting Det. Camacho's subjective belief that the second session of Lujan's interview was merely a continuation of the first, the trial court characterized as "findings of fact" its legal conclusion that the second session was not a continuation of the first, such that the *Miranda* warnings Lujan received 19 minutes before were no longer effective. (244CR:48-49); (245CR:88-89). In reaching this conclusion, the trial court highlighted the following alleged "facts:" (1) Lujan was told that "...they could continue the statement when they returned;"[7] (2) the detectives moved the location of Lujan's interview to their vehicle; (3) Det. Camacho led the interrogation in the car; (4) they "...talked about other cases;" and (5) the detectives failed to read Lujan the *Miranda* warnings again while in their car. (244CR:49); (245CR:89).

[7] While the record supports a finding that Det. Ochoa made the offhand comment that "...when we come back, we can continue, if you like," no witness with personal knowledge of what Det. Ochoa meant when he made that comment testified that the purpose of this comment was to convey to Lujan that "...they would *continue the statement* when they returned." (244CR:49); (245CR:89) (emphasis added). And because Lujan, who did not testify at the suppression hearing, has never testified that that was her interpretation of this comment, the trial court's implication that that was Lujan's understanding of this comment is unsupported by the record and based on pure speculation.

SUMMARY OF THE STATE'S ARGUMENTS

The totality of the circumstances, as expressly found by the trial court in its findings of fact and established by indisputable video evidence, demonstrates that Lujan's second-session interview was, temporally and substantively, an almost-seamless continuation of the first, specifically: (1) the second session of Lujan's interview began a mere 19 minutes after she received, and voluntarily waived, her *Miranda* warnings and only 6 minutes after the first session of her interview ended; (2) both sessions of her interview were conducted by the same two detectives, from the same law-enforcement agency, investigating the September 12, 2016, crime spree that resulted in Trejo's murder, the disposal of his body, and the kidnappings of Hall and Isaac; (3) after Lujan was informed of her rights to counsel and to remain silent, she indicated her intent to *further* communicate with the detectives when she *volunteered* to take them to Trejo's body.

Additionally, requiring police to re-*Mirandize* a suspect if the police engage in ambiguous conduct that *could be* construed as terminating, or setting a temporal limitation on, the interrogation (and attendant *Miranda* rights) undermines the ease and clarity of *Miranda's* application by requiring officers to continually second-guess whether they made any such potentially ambiguous statements. Thus, in light of: (1) the continuity of interrogation where Lujan was arrested and

brought in for questioning in connection with Trejo's murder; and (2) the same two detectives conducting the second-session interview while looking for Trejo's body, during which other matters related to the same crime spree as Trejo's death were addressed, it is simply unreasonable to conclude that Det. Ochoa's vague and ambiguous comment as he left the interview room constituted some kind of "...significant change in the character of the interrogation," such as a defendant's clear-and-unequivocal invocation of a *Miranda* right, requiring the re-administration of warnings.

Consequently, the Eighth Court erred in upholding the trial court's suppression ruling as to Lujan's second-session recording.

ARGUMENT AND AUTHORITIES

SOLE GROUND FOR REVIEW: The Eighth Court erred in upholding the trial court's ruling that the second, in-car session of Lujan's interview was not a continuation of the first, interview-room session, because: (1) under the *Bible* factors, the second-session interview was a continuation of the first; and (2) requiring police to re-*Mirandize* a suspect if the police engage in ambiguous conduct that *could be* construed as terminating, or setting a temporal limitation on, the interrogation (and attendant *Miranda* rights) undermines the ease and clarity of *Miranda's* application by requiring officers to continually second-guess whether they made any such potentially ambiguous statements.

I. Standard of review

A reviewing court reviews a trial court's ruling on a motion to suppress under a bifurcated standard of review. *See St. George v. State*, 237 S.W.3d 720, 725 (Tex.Crim.App. 2007). The reviewing court should not engage in its own factual review, as the trial judge is the sole trier of fact and judge of credibility of the witnesses and the weight to be given their testimony. *See id*. Rather, reviewing courts should afford almost total deference to the trial court's rulings on questions of historical fact and application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor, so long as those findings are supported by the record. *See id*.; *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997). If the resolution of the substantive issue does not turn on the evaluation of credibility

and demeanor, *de novo* review is appropriate. *See Abney v. State*, 394 S.W.3d 542, 547 (Tex.Crim.App. 2013); *Guzman*, 955 S.W.2d at 89.

For the following reasons, even after deferring to the trial court's resolution of what were actually fact issues, the Eighth Court erred in holding that those facts, as found by the trial court, demonstrated that the second, in-car session of Lujan's interview was not a continuation of the first, interview-room session.

II. Under the *Bible* factors, the second, in-car session of Lujan's interview was a continuation of the first, interview-room session.

As this Court has recognized, in a situation where a suspect has been provided her *Miranda*[8] and article 38.22[9] warnings, a break in the questioning occurs, and then questioning resumes without the re-administration of warnings, the *Miranda* and article 38.22 warnings previously given remain effective as to the admissions made during the subsequent statement if, under the totality of the circumstances, the subsequent interview is essentially a continuation of the first. *See Bible v. State*, 162 S.W.3d 234, 242 (Tex.Crim.App. 2005); *Dunn v. State*, 721 S.W.2d 325, 338 (Tex.Crim.App. 1986) (holding that neither state-constitutional nor statutory law required that a defendant be rewarned where the interrogation is

[8] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[9] *See* TEX. CRIM. PROC. CODE art. 38.22.

only a continuation of prior questioning), *abrogated on other grounds by Creager v. State*, 952 S.W.2d 582 (Tex.Crim.App. 1997); *Ex parte Bagley*, 509 S.W.2d 332, 337-38 (Tex.Crim.App. 1974); *see also Burruss v. State*, 20 S.W.3d 179, 183-84 (Tex.App.–Texarkana 2000, pet. ref'd).[10] In assessing the continued efficacy of *Miranda* and article 38.22 warnings, courts consider factors such as: (1) the passage of time; (2) whether the interrogations are conducted by different people; (3) whether the interrogations relate to different offenses; and (4) whether the second interviewer asks the suspect if she received the warnings earlier, if she remembers the warnings, and if she wishes to invoke her rights. *See Bible*, 162 S.W.3d at 252, *citing Jones v. State*, 119 S.W.3d 766, 773 n.13 (Tex.Crim.App. 2003). And this Court has held that a break of as much as six to eight hours does not necessarily negate the effectiveness of *Miranda* warnings. *See Ex parte Bagley*, 509 S.W.2d at 337-38.

A. The passage of time

In this case, it was undisputed, and the trial court agreed, that Lujan was *Mirandized* and voluntarily waived her rights prior to her first-session interview. And the undisputed facts show a pause in time between the first and second

[10] Because the analysis of the continued efficacy of *Miranda* warnings essentially mirrors the analysis for article 38.22 warnings and concerns the same facts, the State will address both together.

sessions of Lujan's interview that was so short as to not constitute any kind of meaningful break at all. Specifically, only 6 minutes lapsed between the first and second sessions of Lujan's interview, and the second session of her interview resumed in the detectives' vehicle a mere 19 minutes after she was initially *Mirandized* and voluntarily waived her rights. The first *Bible* factor thus weighs heavily in favor of concluding that the second session of Lujan's interview was a continuation of the first. *See*, *e.g.*, *Bible*, 162 S.W.3d at 242.

B. Whether the interrogations are conducted by different people

In its opinion, the Eighth Court, agreeing that the first *Bible* factor weighed heavily in the State's favor, determined that the second *Bible* factor was "neutral at best" because although the same two detectives conducted both the first and second sessions of Lujan's interview and "...both asked substantive questions in both sessions," the trial court found that one of those same two detectives predominated the first-session interview, while the other detective predominated the second-session interview. *See Lujan*, 2018 WL 4660185 at *7-8; *Lujan*, 2018 WL 4659578 at *7-8.

But this Court in *Bible* determined that the complained-of interview in that case was just one session of a continuous interview based partly on circumstances similar to this case: "Although different officers conducted questioning during

each session and each session focused on a different set of crimes, the same officers were present during both sessions." *See Bible*, 162 S.W.3d at 242. In this case, not only were both the first and second sessions conducted by the same two detectives, namely, Dets. Ochoa and Camacho, both detectives were from the same law-enforcement agency and were investigating the same matters. Thus, notwithstanding any findings by the trial court as to which detective asked what questions, the fact that the same two detectives conducted both sessions of Lujan's interview, particularly with such a negligible break in time between both sessions, weighs in favor of concluding that the second-session interview was a continuation of the first. *See*, *e.g.*, *Bible*, 162 S.W.3d at 242 (holding that the complained-of interview was just one session of a continuous interview even though different officers–a detective with a Louisiana sheriff's office and a Louisiana state trooper–conducted the questioning during each session, where the same officers were present during both sessions).

And to the extent that the Eighth Court determined that this *Bible* factor did not weigh in the State's favor because the trial court made a "fact finding" that Lujan's second-session interview was not a continuation of the first, it erred because the question of whether a subsequent interview is a continuation of a prior interview (after affording proper deference to the trial court's resolution of what

are actually fact issues) is a legal question that is subject to *de novo* review by an appellate court. *Cf. State v. Mechler*, 153 S.W.3d 435, 439 (Tex.Crim.App. 2005) ("[A] statement in a trial judge's findings of fact and conclusions of law regarding the role witness credibility played in its decision cannot determine an appellate court's standard of review. The court's inclusion of this sentence in its findings does not grant it the ability to control how its rulings will be reviewed.").

C. Whether the interrogations relate to different offenses

The Eighth Court further held in its opinion that the third *Bible* factor was also "neutral at best" because the trial court found that the "...second interview raised different and additional inquiries into separate crimes" and because "[t]he record does show that the first interview broached the subject of Trejo's murder, and the theft of James Hall's car," while "[t]he second interview included Anthony [sic] Lujan['s] and James Hall's kidnapping, Lujan's drug usage and smuggling, and her role in the disposal of Trejo's body." *See Lujan*, 2018 WL 4660185 at *7-8; *Lujan*, 2018 WL 4659578 at *7-8.

But, as noted above, this Court in *Bible* determined that the complained-of interview in that case was a continuation of a prior interview even where both sessions of the interview focused on different sets of crimes, specifically, a rape/murder that the defendant committed in Houston and three murders

committed by the defendant in Palo Pinto County, Texas. *See Bible*, 162 S.W.3d at 238-39, 242. In this case, to support its conclusion that Lujan's second-session interview was not a continuation of the first, the trial court found that, in addition to Trejo's murder and the disposal of his body, Lujan was interrogated about "...kidnappings, drug use and distribution, car theft, prostitution and other issues." (244CR:49); (245CR:89). These offenses, however, were either related to the September 12, 2016, crime spree that resulted in the kidnapping of Hall and Isaac, the murder of Trejo, and the disposal of Trejo's body, and the remaining offenses (such as prostitution and/or drug use and distribution) were simply incidentally related to that crime spree because they were part of Lujan's explanation as to how she knew the individuals involved in the charged offenses, such that the first and second sessions of Lujan's interview did not truly involve different sets of offenses, but related to the same subject matter for which Lujan had already been *Mirandized*. *See Dunn*, 721 S.W.2d at 338 ("Neither our constitutional nor statutory law requires that a defendant be rewarned when there is a transition from questioning him regarding one offense to questioning him regarding another offense, nor have we found any requirement in our law that the *Miranda* warnings must be limited to any specific unlawful conduct....").

Regardless of whether the trial court credited the detectives' stated "reason" for accommodating Lujan's request to take them to Trejo's body, (244CR:48); (245CR:88), an officer's subjective state of mind is generally irrelevant to "...the question of the intelligence and voluntariness of [the defendant's] election to abandon [her] rights," *see Moran v. Burbine*, 475 U.S. 412, 423, 106 S.Ct. 1135, 1142, 89 L.Ed.2d 410 (1986), and the indisputable video evidence demonstrated that Lujan, after being questioned about Trejo's murder, expressly and willingly *volunteered* to take the detectives to the location of Trejo's body, which is what precipitated the second-session interview in the detectives' vehicle in the first place. In other words, Lujan, who was specifically brought in for questioning in connection with Trejo's murder, can hardly state that she reasonably believed that the second session of her interview, in which the detectives accommodated her repeated requests to take them to the location of Trejo's body, was unconnected to the first session, during which she was questioned about Trejo's murder.

Where Lujan was reasonably aware that the first two sessions of her interview were connected and were about the same September 12, 2016, crime spree, the third *Bible* factor weighs in favor of finding that the second-session interview was merely a continuation of the first. *See Bible*, 162 S.W.3d at 242; *Burruss*, 20 S.W.3d at 184; *Hayes v. State*, No. 05-11-00260-CR, 2013 WL

1614108 at *3 (Tex.App.–Dallas, Feb. 19, 2013, no pet.) (not designated for publication); *Spears v. State*, No. 05-06-00691-CR, 2007 WL 2447233 at *4 (Tex.App.–Dallas, Aug. 30, 2007, no pet.) (not designated for publication) (cases holding that *Miranda* and article 38.22 warnings given at prior interview session were still effective for subsequent interview session, even though both sessions involved different offenses); *cf. Dunn*, 721 S.W.2d at 338 ("The facts clearly reflect that there was a continuity of interrogation that pertained to the same offense after the warnings were given.").

D. Whether the defendant is reminded of her rights

Acknowledging that *Bible* did not require a showing that Lujan had been reminded of her rights before a court could conclude that her second-session interview was a continuation of the first and citing cases specifically holding that the subsequent interviews in those cases were a continuation of a prior interview, even though the defendant was not rewarned, *see Lujan*, 2018 WL 4660185 at *8 ("...we would agree that the four *Bible* factors are not posed in the conjunctive in the sense that the State must check each off to prevail"); *see also Lujan*, 2018 WL 4659578 at *8, the Eighth Court nevertheless held that the fourth and final *Bible* factor "...weigh[s] the heaviest against the State" because "[t]he detectives did not remind Lujan of her rights." *See Lujan*, 2018 WL 4660185 at *8; *Lujan*, 2018 WL

4659578 at *8. Aside from the fact that this Court in *Bible* did not appear to assign any particular proportional weight to any of the foregoing factors, *see Bible*, 162 S.W.3d at 242, it was objectively reasonable for the detectives to believe that a reminder was not necessary where: (1) Lujan received, and waived, her *Miranda* rights a mere 19 minutes before the commencement of the second-session interview; and (2) only a 6-minute pause occurred between the first and second sessions of her interview. *See Jackson v. State*, No. 01-16-00242-CR, 2018 WL 1003362 at *4 (Tex.App.–Houston [1st Dist.], Feb. 22, 2018, pet. ref'd) (mem. op.) (not designated for publication); *Stallings v. State*, No. 09-09-00200-CR, 2010 WL 2347244 at *3 (Tex.App.–Beaumont, June 9, 2010, pet. ref'd) (mem. op.) (not designated for publication) (cases holding that the defendant's second interview was a continuation of his initial interview, even though he was not reminded of his *Miranda* rights at the beginning of the second interview, because only a matter of minutes or several hours had transpired between the two interviews).

In this case, the totality of the foregoing circumstances, as expressly found by the trial court in its findings of fact and established by indisputable video evidence, demonstrates that Lujan's second-session interview was, temporally and substantively, an almost-seamless continuation of the first, specifically: (1) the

second session of Lujan's interview began a mere 19 minutes after she received, and voluntarily waived, her *Miranda* warnings and only 6 minutes after the first session of her interview; (2) both sessions of her interview were conducted by the same two detectives, from the same law-enforcement agency, investigating the September 12, 2016, crime spree that resulted in Trejo's murder, the disposal of his body, and the kidnappings of Hall and Isaac; and (3) after Lujan was informed of her rights to counsel and to remain silent, she indicated her intent to *further* communicate with the detectives when she *volunteered* to take them to Trejo's body. *See Bible*, 162 S.W.3d at 242; *Dunn*, 721 S.W.2d at 338-39; *Burruss*, 20 S.W.3d at 184; *Flemming v. State*, 949 S.W.2d 876, 880 (Tex.App.–Houston [14th Dist.] 1997, no pet.) (holding that the second interrogation was merely a continuation of the interrogation process and was not such a break to require rewarning where the detective admonished appellant at the beginning of the interrogation, there was a short pause in which the detective activated a hidden recording device before rejoining appellant, and a second interrogation commenced after appellant acknowledged that the detective had advised him of his rights); *Stallings*, 2010 WL 2347244 at *3 (holding that the *Miranda* and article 38.22 warnings the defendant received at the outset of his first interview were effective during the joint interview of the defendant and his accomplice in a

different interview room where, although the defendant was not reminded of those warnings, only 5 minutes transpired between his first individual interview and the joint interview, both interviews concerned the same murder, and one of several detectives was present throughout all of the defendant's interviews).

III. Requiring police to re-*Mirandize* a suspect if the police engage in ambiguous conduct that *could be* construed as terminating, or setting a temporal limitation on, the interrogation (and attendant *Miranda* rights) undermines the ease and clarity of *Miranda's* application by requiring officers to continually second-guess whether they made any such potentially ambiguous statements.

The Eighth Court ultimately held that the trial court did not abuse its discretion in concluding that the second session of Lujan's interview was not a continuation of the first based on the combination of the detectives' failure to remind Lujan of her rights and two additional circumstances. *See Lujan*, 2018 WL 4660185 at *9; *Lujan*, 2018 WL 4659578 at *9. Specifically, first noting that the trial court had relied on the fact that the second-session interview was conducted in a different setting–the detectives' vehicle–in concluding that the second-session interview was not a continuation of the first, the Eighth Court explained that:

> ...Were that the trial court's sole additional rationale, we might discount it as we did in *Cotten v. State*, 08-13-00051-CR, 2013 WL 6405511 at *4 (Tex.App.–El Paso Dec. 4, 2013, pet. [ref'd])(not designated for publication) (first interview in bedroom when defendant arrested, and second at the police station). But the trial court here also relied on the detective's statement at the end of the first recording that "when we come

> back, we can continue, if you like." The detective's statement is the sharpest cut against the State's position. In common parlance, the statement would signal the end of something with the prospect that it could be continued. And the detective did not say we can continue when we get in the car to drive out to the body. He said they could continue when they got back to the police station.

See Lujan, 2018 WL 4660185 at *8; *Lujan*, 2018 WL 4659578 at *8. In other words, the Eighth Court essentially held that the *Bible* factors likely would have tipped in the State's favor, but for this offhand comment by Det. Ochoa as he left the interview room.

The United States Supreme Court has explained that "'[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application" and has declined to extend *Miranda* in ways that "...would have the inevitable consequence of muddying *Miranda's* otherwise relatively clear waters." *See Burbine*, 475 U.S. at 425, *quoting Berkemer v. McCarty*, 468 U.S. 420, 430, 104 S.Ct. 3138, 3145, 82 L.Ed.2d 317 (1984). To that end, the Supreme Court has provided the bright-line rule that a suspect's invocation of her *Miranda* rights must be clear and unequivocal before police are required to terminate questioning because anything less than that would force police officers "...to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the

threat of suppression if they guess wrong." *See Davis v. United States*, 512 U.S. 452, 460-61, 114 S.Ct. 2350, 2355-56, 129 L.Ed.2d 362 (1994).

The foregoing reasoning regarding the ease and clarity of *Miranda's* application should apply with equal force here. Nothing in Det. Ochoa's vague and ambiguous statement, on its face, clearly conveyed to all involved that the detectives' interrogation of Lujan (and the application of the *Miranda* and article 38.22 warnings initially given) was officially over at that point and that nothing she stated thereafter could be used against her. By informing Lujan that the interrogation would continue, Det. Ochoa's statement had the converse effect of advising Lujan that the interrogation was not in fact officially over and would be ongoing. And Det. Ochoa's statement was made only after Lujan, who had been informed of her rights to counsel and to remain silent, had already volunteered to further communicate with them while she led them to Trejo's body.

In the absence of a clear-and-unambiguous statement to Lujan that the interrogation was over and that the warnings were no longer effective, the effect of the Eighth Court's holding that Lujan should have been re-*Mirandized* on the basis of a vague statement that could have been construed as terminating, or setting some kind of temporal limitation on, the interrogation is that police must now continually second-guess whether they made any such potentially ambiguous

statements and promptly re-*Mirandize* the defendant or risk the suppression of any statements made thereafter. The Eighth Court's requirement in this regard thus undermines the intended ease and clarity of *Miranda's* application and unduly hampers law-enforcement's legitimate efforts to obtain admissions of guilt. *See Burbine*, 475 U.S. at 426 (recognizing that *Miranda* sought to strike a balance between protecting a defendant from constitutionally impermissible compulsion and the police's legitimate efforts to obtain admissions of guilt that are essential to society's compelling interest in finding, convicting, and punishing those who violate the law).

Additionally, the Eighth Court's requirement that *Miranda* and article 38.22 warnings be re-administered any time the police engage in ambiguous or vague conduct that *could be* seen as terminating, or setting a temporal limitation on, the interrogation renders meaningless this Court's recognition in *Bible* that some situations do not require the re-administration of warnings, *see*, *e.g.*, *Bible*, 162 S.W.3d at 242, because any number of actions by the police, such as simply leaving the room for a short time to confer outside the presence of the defendant, *could be* construed as "...signal[ing] the end of something [(that portion of the interview)] with the prospect that it be continued [(when police reenter the room)]."

In light of: (1) the continuity of interrogation where Lujan was arrested and brought in for questioning in connection with Trejo's murder; and (2) the same two detectives conducting the second-session interview while looking for Trejo's body, during which other matters related to the same crime spree as Trejo's death were addressed, it is simply unreasonable to conclude that Det. Ochoa's vague and ambiguous comment as he left the interview room constituted some kind of "...significant change in the character of the interrogation," such as a defendant's clear-and-unequivocal invocation of a *Miranda* right, requiring the re-administration of warnings. *Cf. Wyrick v. Fields*, 459 U.S. 42, 47-48, 103 S.Ct. 384, 396, 74 L.Ed.2d 214 (1982) (holding that where the defendant had already waived his rights prior to submitting to a polygraph examination, police were not required to re-administer *Miranda* warnings when the defendant was questioned after the examination about the unfavorable results because disconnecting the polygraph equipment effectuated no significant change in the character of the investigation, nor did it serve to remove the defendant's knowledge of his rights from his mind). And absent such a significant change in the character of the interrogation, a requirement that *Miranda* warnings be repeated under the circumstances of this case would turn *Miranda* into nothing more than a time- and location-specific formalistic ritual, rather than a procedural safeguard to inform a

suspect of her rights and to ensure a continuous opportunity to exercise them. *See Gorman v. United States*, 380 F.2d 158, 164 (1st Cir. 1967) (explaining that the purpose of the warnings required by *Miranda* was "...not to add a perfunctory ritual to police procedures but to be a set of procedural safeguards []to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it[]") (internal quotation marks omitted); *State v. Harvill*, 403 So.2d 706, 709 (La. 1981) (holding that a requirement that *Miranda* warnings be repeated before each separate and distinct interrogation session "...would quickly degenerate into a formalistic ritual").

In its findings of fact, the trial court stated that:

> Based on the demeanor of the witnesses and totality of circumstances, the Court finds that–a) Detective Ochoa told Lujan that supervisors wanted them to get back soon; and b) Detective Ochoa stated "when we come back, we can continue, if you like"–so that Ms. Lujan would believe that although any statements made at the interview room at police headquarters would be used against her, any statements made on the way to look for the body would not.

(244CR:48); (245CR:88). As the State argued in its appellate brief before the Eighth Court, any findings of fact by the trial court as to what inference Lujan drew from Det. Ochoa's ambiguous comment constitute speculation and are unsupported by the record because Lujan, the only person with personal knowledge as to what inference she drew from Det. Ochoa's statement, if she in

fact heard and thought about the statement at all, did not testify, such that the trial court's findings in this regard are entitled to no deference. *See*, *e.g.*, *Hereford v. State*, 339 S.W.3d 111, 120-21 (Tex.Crim.App. 2011) (holding that a trial court's fact findings that are not supported by the record are entitled to no deference on appeal); *State v. Dewbre*, No. 03-15-00786-CR, 2017 WL 3378882 at *6 (Tex.App.–Austin, July 31, 2017, pet. ref'd) (mem. op.) (not designated for publication) (declining to defer to a fact finding by the trial court that the defendant believed that he was deprived of his freedom of movement, for purposes of determining whether the defendant had been in custody at the time of his inculpatory admissions, where the defendant did not testify at the hearing on his motion to suppress).

Additionally, what Lujan subjectively believed or desired about the parameters of the second session of her interview–that "...although any statements made at the interview room at police headquarters would be used against her, any statements made on the way to look for the body would not"–is irrelevant in determining whether the second session was a continuation of the first, particularly where it would be unreasonable, in the absence of police misconduct, to impose the harsh sanction of evidentiary exclusion because the police were unable to divine a suspect's subjective desires about the limits of her previous

voluntary waiver. *Cf. Stiles v. State*, 927 S.W.2d 723, 730 (Tex.App.–Waco 1996, no pet.) (explaining that the test for whether the defendant properly waived his right not to be interrogated was an objective one, noting the absence of authority allowing a criminal suspect to set the parameters of the interrogation, and holding that "[i]t would be futile for this court to require law enforcement officials to recognize the extent to which the suspect has waived his right to halt any questioning," which would be "...an ill-advised requirement"). And although Det. Ochoa's subjective intent is irrelevant in this analysis, *see*, *e.g.*, *Burbine*, 475 U.S. at 423, there was no testimony from Det. Ochoa that he made this statement with the intent to convey to Lujan that the interrogation was over and that whatever statements she made thereafter, or in the car in between the first and third interview-room sessions of her interview, would not be used against her.

Under the totality of the circumstances, the first two sessions of Lujan's interview were ultimately part of a single, three-part interview for purposes of *Miranda* and article 38.22, and the initial warnings given at the outset of the first session were still effective for the second. *See*, *e.g.*, *Bible*, 162 S.W.3d at 242; *Dunn*, 721 S.W.2d at 338-39; *Burruss*, 20 S.W.3d at 184; *Flemming*, 949 S.W.2d at 880; *Stallings*, 2010 WL 2347244 at *3 (holding that the *Miranda* and article 38.22 warnings the defendant received at the outset of his first interview were

effective during the joint interview of the defendant and his accomplice in a different interview room where, although the defendant was not reminded of those warnings, only 5 minutes transpired between his first individual interview and the joint interview, both interviews concerned the same murder, and one of several detectives was present throughout all of the defendant's interviews).

Because the trial court erred and abused its discretion in determining that Lujan was not sufficiently warned, pursuant to *Miranda* and article 38.22, prior to the second session of her interview, the Eighth Court erred in upholding the trial court's suppression ruling in this regard, and its judgment as to Lujan's second-session recording should be reversed.

PRAYER

WHEREFORE, the State prays that this Court reverse the judgments of the Eighth Court as to the second-session recording and remand the case to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document contains 6,703 words.

/s/ Lily Stroud
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CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on June 26, 2019, a copy of the foregoing brief on the State's petition for discretionary review was sent by email, through an electronic-filing-service provider, to appellee's attorney: Greg Anderson, Ander807@hotmail.com.

(2) The undersigned also does hereby certify that on June 26, 2019, a copy of the foregoing brief on the State's petition for discretionary review was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

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